Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-215

JOEL H. DARK - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JOEL H. DARK - - - - - *Petitioner*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, JOEL H. DARK, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on May 4, 1979.

OPINIONS BELOW

The Opinion of the Court of Appeals entered on May 4, 1979 (Appendix A) is reported at 597 F. 2d 1097. A Petition for Rehearing With Suggestion of Appropriateness of Rehearing En Banc was timely filed. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing (Appendix B) was entered on June 13, 1979.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit (Appendix A) was entered on May 4, 1979; a timely Petition for Rehearing was denied by Order of the Court of Appeals for the Sixth Circuit (Appendix B) on June 13, 1979; and a timely Motion to Stay Mandate was granted by the Court of Appeals for the Sixth Circuit (Appendix C) on July 3, 1979. A Motion for Extension of Time in Which to File Petition for Writ of Certiorari was mailed on July 26, 1979, which Motion was returned by the Clerk explaining it was out-of-time. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the District Court committed prejudicial error in denying Petitioner his right to present his defense as guaranteed by the Sixth Amendment to the Constitution of the United States.
2. Whether the Petitioner was denied a fair trial when the District Court Judge assumed a tripartite role (consisting of prosecutor, judge and jury) in conducting the trial.
3. Whether the District Court committed prejudicial error in denying Petitioner's request for Jencks Act statements without following statutory procedures, in violation of 18 U.S.C. §3500.
4. Whether Petitioner was denied a fair trial when the District Court applied different standards on

the same issues to the prosecution and defense and an erroneous standard on the vital issue of criminal willfulness.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18 U.S.C. §3500 provides in pertinent part as follows:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

. . . . . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

. . . . . .

STATEMENT OF THE CASE

This is a prosecution under 26 U.S.C. §7203. The case was tried before a jury in the United States District Court for the Middle District of Tennessee, Nashville Division, on May 16 and 17, 1978.

The two-count information charged that the Petitioner willfully failed to make income tax returns on or before the due dates of individual income tax returns reporting income for the years 1973 and 1974.

Petitioner moved the District Court to require the United States attorney to file with the clerk the returned subpoenas served upon witnesses for the government or, in the alternative, to enjoin the introduction of evidence from such witnesses. The District Judge denied this motion immediately prior to commencing the trial.

After presentation of that evidence allowed by the District Court, the case was submitted to the jury. The jury "deliberated" for three to five minutes and returned a verdict of guilty on each count. Petitioner was sentenced to imprisonment for five months on count one and for one year on count two, with the sentence as to count two suspended and Petitioner placed on probation for a period of three years.

Petitioner appealed the conviction to the Court of Appeals for the Sixth Circuit. On appeal Petitioner argued that the District Court committed prejudicial error in denying Petitioner his right to present competent, material evidence in his defense; in conducting the trial in a biased, prejudicial manner with the trial judge acting as prosecutor and jury as well as judge;

in denying Petitioner's request for Jencks Act statements with no attempt to follow statutory procedures; in applying, on the same issues, one standard for the government and another standard for the defendant; and in applying an erroneous definition of criminal willfulness.

Petitioner's conviction was affirmed in a Per Curiam Opinion of the Court of Appeals (Appendix A), which recognized merit in some of Petitioner's contentions but held the erroneous actions of the trial court to be harmless. A timely Petition to Rehear with Suggestion of Appropriateness of Rehearing En Banc was filed; which Petition was denied (Appendix B). Petitioner filed a Motion for Stay of Mandate which was granted on July 3, 1979 (Appendix C).

REASONS FOR GRANTING THE WRIT

1. This Court Now Has the Opportunity to Correct the Holding of the Court of Appeals for the Sixth Circuit That Denial of a Criminal Defendant's Right to Present His Defense Is Harmless Error and to Clarify for All Courts the Standards to Be Applied in Determining Whether Deprivation of Constitutional Rights Is Prejudicial.

Petitioner in this case was charged with two counts of willful failure to timely file individual income tax returns. Of the three elements of that offense (sufficient gross receipts to require the filing of a return, failure to file the return by a specified date, and that the failure be willful), only the third—willfulness—was in dispute.

The prosecution relied upon evidence of Petitioner's background and vocation, the gross receipts of his accounting practice and his teaching salary, and Petitioner's filing history to prove willfulness. Petitioner agrees it is proper for a trier of fact to consider circumstances such as these. Petitioner attempted to introduce evidence to rebut and explain the evidence of the prosecution and to show circumstances which would have indicated the late filing was not criminally willful. The trial judge refused to allow this evidence to be adduced.

To prove Petitioner's income, the prosecution introduced a list of receipts on accounts receivable of Petitioner's accounting practice totalling $36,311.10 in 1973 and $40,779.22 in 1974, and displayed on a blackboard for the judge and jury these total amounts. Individual clients of Petitioner then testified concerning total amounts they had paid Petitioner for accounting work during these years. All these amounts were added to the blackboard. On cross-examination of these clients, however, it was proven these amounts were *all* included in the first-posted totals and were thus duplications. Not only was the Petitioner denied an opportunity to explain the amounts written on the blackboard, the duplicated amounts were left in sight of the judge and the jury until closing argument, at which time counsel for the Petitioner insisted these amounts be removed from the blackboard.

Petitioner testified and attempted to prove the amount of his income. The trial judge allowed Petitioner to introduce into evidence his partnership tax

returns and his individual income tax returns, but neither the judge nor the jury examined them. When Petitioner was asked the first question concerning his income from the partnership, the trial judge interjected his own objection and ruled that evidence inadmissible, although earlier in the trial, the trial judge had given the government wide latitude in introducing evidence concerning the amount of Petitioner's income.

Petitioner contends that that evidence is admissible and is vital. Had the prosecution been using this evidence only to show that Petitioner met the requirements for filing a tax return (testified to as being $750.00 for each year) only one witness would have been necessary. Instead, a virtual parade of witnesses testified to quite large amounts of money paid to Petitioner—all of which were duplications by virtue of having been included in the total first posted. Petitioner is well aware that a large income with large resulting tax liability is the most frequent circumstance relied upon by the prosecution to prove and by the courts to uphold a finding of criminal willfulness. Petitioner is also aware that his share of the accounting partnership gross receipts is the proper factor to be considered in determining a requirement to file. However, because a finding of willfulness is necessary for a failure to timely file a tax return to be criminal, the difference between gross receipts and income is relevant and material for the trier of fact to be enabled to give that circumstance a reasoned and proper consideration, especially since that difference is not commonly appreciated by the vast numbers of the

populace who work for wages which are annually reported to them by their employer on a form W-2.

While the prosecution was allowed full authority to present large—and misleading—figures to the judge and jury, Petitioner was not allowed to present the *facts* concerning his income. The single concession made was allowing Petitioner to introduce his tax returns—but these were not examined by anyone. The vital importance of this issue to Petitioner is revealed by the trial judge who, during a bench conference with counsel, stated: "He didn't file them because *he wanted to make money off of somebody else*" (TR 207), and again, "The reason is that *he wanted to make money* . . ." (TR 208), and again, ". . . whatever number of hours he spent working day and night *to make money* . . ." (TR 208). At least one of these instances was audible to the jury. The trial judge then cross-examined the Petitioner, saying, ". . . you elected to spend your time *making money off of somebody else* . . . is that not correct?" (TR 210). (Petitioner denied the correctness of that statement.) When the prejudicial effect of such one-sided evidence is so obvious on that person in the courtroom most trained and experienced in judicial proceedings, one cannot sanely doubt the prejudicial effect on the jury.

Petitioner continued in his defense to try to put into evidence the circumstances which resulted in the late filing of his tax returns. The trial judge reluctantly allowed Petitioner to introduce his time records into evidence and to testify to the extraordinarily large amounts of time expended attempting to maintain those

books and records which his background as an auditor and comptroller taught him to be necessary and proper for a complete and correct accounting to be made to his clients, his government, and himself.

The Court's attitude towards all of Petitioner's evidence is revealed (TR 197):

> By the Court: . . . I don't think this is even material, but they claim that's their defense, and if they can convince the jury of it, I guess they've got a right to do it, but I think it's . . .
>
> By Mr. Clark: We think it's material on the question of willfulness.
>
> By the Court: I don't think it is admissible on the basis of willfulness. I think the whole—now, you may convince the jury, which is what you're trying to do, but I think—well, anyhow, go on.

However, when Petitioner attempted to introduce some of his records, the trial judge said, "I sustain the objection . . ." (None had been made.) And he refused to allow further presentation of Petitioner's records.

The Court of Appeals for the Sixth Circuit did not comment on the exclusion of Petitioner's evidence concerning income, but agreed that the trial judge's refusal to admit evidence concerning records was error. That Court concluded that, because "of the overwhelming evidence of [Petitioner's] guilt" the error was harmless. Petitioner contends that any evidence not allowed to be explained or rebutted will be "overwhelming" in the hands of a skilled advocate. That

Court is thereby holding that the circumstances presented by the prosecution not only are probative of the possible existence of criminal willfulness but are *conclusive* and *irrebuttable* evidence of that state of mind, placing the administration of criminal justice today in harmony with that which prevailed in England when Sir Walter Raleigh could only argue that the prosecution had not completely proved its case.

This Honorable Court has guarded and defended the right of a person to be fully heard, even in non-criminal matters. Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 71 S. Ct. 624 (1951), wrote:

> This Court is not alone in recognizing that *the right to be heard* before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Much more recently, this Court decided *Faretta* v. *California,* 422 U. S. 906, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). There Mr. Justice Stewart, writing for the majority, stated:

> The rights to notice, confrontation, and compulsory process, when taken together guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the [Sixth] Amendment consitutionalizes the right in an ad-

versary criminal trial to make a defense as we know it.

In his dissent, Mr. Chief Justice Burger, succinctly stated:

> In short, both the "spirit and the logic" of the Sixth Amendment are that every person accused of crime shall receive the *fullest possible defense* . . ." (Emphasis supplied.)

2. This Court Now Has the Opportunity to Refine the Guidelines for the Trial Judiciary of the Country in Fulfilling Their Duty to Properly Conduct Fair and Impartial Trials.

This Honorable Court has rarely spoken on the subject of the necessity of the trial judge's maintaining a judicial role in the conduct of a trial and his duty to guide and control the proceedings in such a manner as to assure the parties a fair and impartial trial. The Courts of Appeals for the various circuits, however, have been confronted with such questions many times and have dealt with them in a myriad of decisions.

The trial judge, in the conduct of Petitioner's trial, abandoned his proper role as impartial judge and moderator of the proceedings taking place before him and assumed the role of prosecutor. Apparently having been convinced by the prosecution's evidence in chief of the Petitioner's guilt of the charged offense, he constantly conveyed to the jury this belief through the method and manner of his participation in the trial.

The second witness for the Petitioner was a former employee. From the beginning of his testimony the

trial judge impatiently interjected himself into the trial, refusing to allow Petitioner's counsel to proceed with the examination of the witness in an orderly fashion. When the witness was first asked about his time records, the trial judge interrupted with "He doesn't know what you're asking him yet. That's what he wants to know; ask him first—what do you want to ask him?" (TR 154-155) When meaningful testimony could not be elicited from the witness without the witness having access to his time records, the trial judge impatiently ordered Petitioner's counsel to "Pass them [the time records] up to him. Let's get some specific information around here!" (TR 157)

Throughout the testimony offered on Petitioner's behalf, the trial judge "sustained objections" which had not been made, assumed the role of interrogator, and admonished Petitioner's counsel with "All right—go on to something else" (TR 193) and similar statements indicating his disinterest in Petitioner's evidence. During the testimony of Petitioner, the trial judge evidenced, as detailed above, the conclusiveness (to him) of the prosecution's evidence of Petitioner's income. Significantly, even upon the sentencing proceeding, the trial judge stated:

> . . . and the only reason he gave for not filing his returns was that he was more interested in making money than he was in complying with the law . . .

and

> and for a lawyer [Petitioner had, between the years here involved and the trial of the case, completed his legal education and passed the Tennessee bar examination] to get up here and say that, it shocked me to the very roots of my being . . . but to have a lawyer get up here and say that he is more interested in making money than he was in complying with the law is just absolutely absurd and unheard of.

No such testimony can be found in the record of the trial of this cause.

Again, the Court of Appeals for the Sixth Circuit considered the isolated questioning of Petitioner on cross-examination by the trial judge and found it to be "dangerously close" to violating the principles of judicial conduct. However, that Court failed to consider that the incident was only one of many and the culmination of the obvious attitude and actions of the trial judge in his refusal to consider that evidence which was introduced and to allow the introduction for consideration of vital evidence on Petitioner's behalf. In Petitioner's case the trial judge's actions were not a small part of a long, arduous trial, the importance of which would be greatly diminished as the trial progressed, but permeated the entirety of Petitioner's attempt to present his defense. The judge's constant participation in the Petitioner's case in chief challenged and denied Petitioner the opportunity to present his defense in an orderly, proper manner, and attacked the credibility of the testimony of Petitioner

and his witnesses in a case in which the only issue to be decided was whether Petitioner's admitted action (or non-action) was criminally willful.

While many reported cases approve an amount of judicial participation in examination of witnesses for purposes of clarification (for example, *United States* v. *Burch,* 471 F. 2d 1314 [6th Cir. 1974]); a judge's participation during trial (whether in the form of interrogating witnesses, addressing counsel, or other conduct) must never reach the point at which it appears clear to the jury that the court believes the accused is guilty. *United States* v. *Nazzaro,* 472 F. 2d 302 (2nd Cir. 1973). Particularly analogous also is *United States* v. *Brandt,* 196 F. 2d 653 (2nd Cir., 1952).

3. This Court Now Has An Opportunity to Clarify the Identity of Material Subject to Disclosure to a Defendant Under the Jencks Act, 18 U.S.C. §3500, and the Procedural Requirements Placed Upon the District Court Proceedings By That Act.

The last witness to testify for the prosecution in its case in chief was Internal Revenue Service Special Agent Larry Hollingsworth. Special Agent Hollingsworth testified at some length concerning his investigation of the Petitioner, that he had interviewed "all the clients of Mr. Dark that I was able to locate" (TR 145); and at some length concerning transactions with Premium Acceptance Corporation. Following his testimony counsel for Petitioner requested Jencks Act material:

> By Mr. Clark: May it please the Court, we respectfully ask under the Jencks Act for Mr.

> Hollingsworth's report or statement so that we may review that before cross-examining him. (TR 145)

Upon the representation of the prosecuting attorney that statements had been provided, and defense counsel's explanation that he had received copies of interview reports of conversations with the Petitioner under Rule 16 relating to pre-trial discovery, the trial judge continued:

> By the Court: Have you given him everything he's testified about, Mr. Windsor?
> By Mr. Windsor: Yes, Your Honor.
> By the Court: Ready, Mr. Clark?

The trial court thus foreclosed Petitioner's statutory right to discover Jencks Act statements of the Special Agent in a manner presaging his attitude towards Petitioner's attempts to present his defense.

The Court of Appeals for the Sixth Circuit held that "Agent Hollingsworth's written case reports are not his 'statements' under 18 U.S.C. §3500(e), and the trial court was under no obligation to examine the file *in camera,* since there was 'no basis for belief that a Jencks Act "statement" existed other than those already furnished defense counsel.' *United States* v. *Nickell,* 552 F. 2d 684, 687-90 (6th Cir. 1977), *cert. denied,* 436 U. S. 904 (1978)." There are so many judicial decisions to the contrary that 5 A L R 3rd 763, §5 states, "All papers written by a government witness himself or his amanuensis which are in the possession of the government are statements within the meaning

of clause (1)." Non-production of revenue agents' memoranda brought reversal by this Honorable Court in *Clancy* v. *United States,* 365 U. S. 312, 81 S. Ct. 645, 5 L. Ed. 2d 574 (1961). Numerous tax cases considered by Courts of Appeals of other circuits have considered the producibility of such reports and the procedures to be followed in the District Courts. For example, the Eighth Circuit held in *Jacobs* v. *United States,* 279 F. 2d 836 (1960) that denial of defendant's motion to examine *all reports and statements* made by such agents to the government was error. The Seventh Circuit, in *United States* v. *Keig,* 320 F. 2d 634 (1963), held that once the defendant had raised an issue of Jencks Act statements, the District Court was required to make its own determination of producibility after examination of the file instead of relying on representations of government counsel. That circuit reiterated in *United States* v. *Cleveland,* 477 F. 2d 310 (1973) that the report of an Internal Revenue Service Special Agent was producible as a statement under the Jencks Act, remanding the case for further proceedings. On appeal from the District Court's finding that Cleveland had not been prejudiced by non-production, the circuit court, in 507 F. 2d 731 (1974) reversed the conviction. Petitioner thus contends that the holding in his case is in conflict with the decisions of this Honorable Court and with decisions of other circuits.

Additionally, Petitioner respectfully submits that the decision of the Court of Appeals for the Sixth Circuit, *U. S.* v. *Nickell, supra,* cited as authority for the decision in this case, represents a dangerous departure

from the most basic principles of criminal justice embodied in our Constitution and tradition. The majority opinion in that case admits, "Routine judicial screening, however, would pose no such problem [revealing unrelated confidential government information] *and might on occasion contribute to a more just result.*" 552 F. 2d at 689. (Emphasis supplied.) The opinion continues, however, to hold that such screening would place too great a burden on trial judges. Petitioner submits that the principles upon which this country is based requires a re-affirmation of the succinct statement of the late Judge William Miller, writing for the same Court in *United States* v. *Crane,* 499 F. 2d 1385, at 1388:

> Yet justice, not judicial economy, is the first principle of our legal system. And under no circumstances may well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental right of a criminal defendant to a fair trial.

4. This Court Has An Opportunity to Supervise the Administration of Criminal Justice in the Trial Courts of the Land By Refusing to Tolerate the Application of Different Standards to Actions and Evidence Concerning the Same Issues for Prosecution and Defense and Has An Opportunity to Clarify for All Courts the Definition of Criminal Willfulness.

Prior to the trial of Petitioner, subpoenas issued under the seal of the court were served upon witnesses for the defense and prosecution. Service of these subpoenas subjected the recipients to an Order of the

issuing court—i.e. they had been ordered to appear and testify and were subject to the power and process of the court should they refuse to obey. The returned subpoenas issued on behalf of the Petitioner were properly filed in the public court record. Those which had been issued on behalf of the prosecution, however, were, by order of the government attorney, withheld from the public record and given to the United States Attorney. Petitioner moved the District Court to order the filing of these orders (subpoenas) in the public record, or, in the alternative, to enjoin the testimony at trial of these witnesses. This motion was denied immediately prior to trial. The argument relied upon to support the denial of the motion is the established view that a criminal defendant is not entitled to the prosecution's "witness list." Petitioner avers that this statement is not responsive to Petitioner's contention. Petitioner believes that returned subpoenas, carrying court sanctions for disobedience, are orders of the issuing court and therefore properly part of the public record. Should *either* party to a dispute wish to keep secret the identity of his witnesses, he may either make arrangements for the proposed witness to be available without subpoena or may present to a judge the compelling reasons requiring secrecy or sealing of the court orders. The Conference Committee Notes regarding Rule 16, Federal Rules of Criminal Procedure, state, ". . . it is not in the interest of the effective administration of criminal justice to require that the government *or the defendant* be forced to reveal the names and addresses of its witnesses before

trial . . ." (Emphasis supplied.) Petitioner believes that the dual standard here applied is insupportable. Petitioner contends that *all* court orders are public records and should be treated as such. If, however, subpoenas are for some reason exempt from public view, then *all* subpoenas should be exempt. The double standard is not supportable.

The standard to be applied to determine the relevance and materiality of proffered evidence differed for the prosecution and the Petitioner. The prosecution was allowed to present in its case in chief gross receipts of Petitioner far in excess of the $750 testified to as the amount which required the filing of a tax return. Evidence of income in excess of $750 is relevant, then, only as a circumstance showing willfulness. After having given the government wide latitude in introducing evidence concerning amounts of income, the trial judge changed the standard of relevance and refused, without objection from the government, to admit Petitioner's relevant evidence on the same issue.

The question of the existence of an accounting partnership, first introduced in the prosecution's case in chief, became of vital importance in that it bore directly on the credibility of Petitioner. Petitioner testified directly that there was a partnership (TR 186). The prosecution, in rebuttal, called William Jordan who testified that he had never been in an accounting or CPA partnership with Petitioner (TR 254). On cross-examination, however, Mr. Jordan testified: (1) that he and Petitioner agreed to do accounting work together, splitting any resulting income or loss between

them, and (2) that they actually did that (TR 255). This testimony established, as a matter of Tennessee law (the Uniform Partnership Act) the existence of the accounting partnership. The trial judge allowed this testimony, instructing the jury that these facts bore "only" on the credibility of Petitioner (TR 260), but in his charge to the jury neglected to charge that as a matter of *law* the facts testified to by both witnesses legally established the existence of the partnership. On such a point of law, proper and complete instructions must be given by the trial judge without request, and the omission was, therefore, plain error affecting substantial rights of Petitioner. The trial judge thus found the evidence to be "relevant enough" to admit for consideration, but not "relevant enough" to properly and completely explain in his charge.

Petitioner thus would urge this Court to affirm the principle enunciated by the Court of Appeals for the Seventh Circuit in *U. S.* v. *Parker,* 447 F. 2d 826 (1971), that on any given issue it is imperative that the trial court apply the same standard to both parties.

The definition of willfulness as used in the criminal tax statutes has caused the courts great difficulty. Its importance lies in the fact that this element is that which distinguishes a taxpayer's civil liability for failure to timely file a tax return from a criminal liability for that action (or non-action). During argument of Petitioner's case in the Court of Appeals for the Sixth Circuit, a judge asked, "He knew he should file and he didn't do it—that's willful, isn't it?" Petitioner believes that statement reveals the erroneous standard utilized in his case and indicates the con-

fusion surrounding the term necessitating clarification from this Court.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit recognized error of the District Court in denying Petitioner his Sixth Amendment right to present his defense, but failed to perceive that very denial as the *cause* of the evidence of guilt being "overwhelming"—because unrebutted—which thus *necessarily* affected the substantial rights of the Petitioner. Furthermore, the assumption by the District Court of the functions of prosecutor and trier of fact, the non-compliance of the trial judge with clear statutory procedures encompassed in 18 U.S.C. §3500, and the application by the trial judge of one standard on the government and another standard on the Petitioner, all resulted in fundamental injustice to the Petitioner denying him his Fifth Amendment entitlement to due process of law. This Court alone can correct that fundamental injustice. The present Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5237

UNITED STATES OF AMERICA *Plaintiff-Appellee* *v.* JOEL H. DARK *Defendant-Appellant*	ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed May 4, 1979.

Before: ENGEL and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

PER CURIAM. Appellant Dark was convicted of two counts of willfully failing to file income tax returns, in violation of 26 U.S.C. § 7203 (1976), after a jury trial in the United States District Court for the Middle District of Tennessee. He was sentenced to five months' imprisonment on count one and to one year's imprisonment on count two, the latter sentence suspended in favor of three years' probation.

The government's evidence was plainly sufficient to support the verdict. During 1973 and 1974, Dark was self-employed as a certified public accountant, he taught elementary accounting at Tennessee State University in Nashville, and he attended law school at night. His total receipts on accounts receivable from his accounting practice amounted to $36,331.10 in 1973 and $40,779.22 in 1974. In 1973 he received a salary of $5,420 from Tennessee State.

He failed to file income tax returns for either year, despite the fact that he had been specifically warned by the Internal Revenue Service of his obligation under the law to file timely returns. Dark had failed to file his returns for the years 1967-1971 until March 1973, when he learned that he was under investigation by the IRS. At that time, Dark assured the IRS that he would comply with all filing requirements in the future.

Dark's defense was that his failure to file had not been "willful." He testified that his financial books and records were simply "not in shape to file a tax return" on the respective due dates, principally because of the complicated and cumbersome nature of his personal accounting system, and that the pressures of his accounting practice and legal studies had distracted him from properly maintaining his books. The jury deliberated only five minutes before returning its verdict of guilty on both counts.

Dark raises numerous claims of error on appeal, most of which are wholly without merit. He contends that the testimony of certain witnesses subpoenaed by the government should have been excluded at trial because the Assistant United States Attorney had instructed the Marshal not to place the returned subpoenas in the case file in the district court clerk's office, thereby preventing defense counsel from looking at the case file to find out who was going to testify for the government. The short answer to this claim is that defense counsel was not entitled to know, in advance of trial, who was going to testify for the government. *United States* v. *Conder,* 423 F. 2d 904, 910 (6th Cir.), *cert. denied,* 400 U. S. 958 (1970).

Dark contends that the district judge committed reversible error during jury selection by telling the panel, in the course of explaining the presumption of innocence and burden of proof in a criminal case, that "Neither side has the edge." Read in context, the remark was apparently calculated to impress upon the prospective jurors that both

parties in a criminal case come before the court with equal dignity and that neither should be arbitrarily favored out of prejudice for or against the government or defendants as a class. While perhaps better left unsaid, the remark could not have confused the jury, especially in light of the district judge's more than adequate explanation of the defendant's presumption of innocence and the government's heavy burden of proof in his other comments to the panel during jury selection and in his instructions at the close of the trial.

Dark also argues that the trial judge erred in refusing to order the government to turn over to defense counsel, as "statements" under the Jencks Act, the contents of IRS Special Agent Hollingsworth's case file after Hollingsworth's testimony at trial, without at least inspecting the file *in camera* to determine whether it contained any Jencks material. Agent Hollingsworth's written case reports are not his "statements" under 18 U.S.C. § 3500(e), and the trial court was under no obligation to examine the file *in camera,* since there was "no basis for belief that a Jencks Act 'statement' existed other than those already furnished defense counsel." *United States* v. *Nickell,* 552 F. 2d 684, 687-90 (6th Cir. 1977), *cert. denied,* 436 U. S. 904 (1978).

Dark's two remaining claims of error are more troublesome. Both involve actions of the trial court, which, Dark argues, unfairly hampered the presentation of his defense.

Dark sought to introduce in evidence some of his personal financial records in an effort to corroborate his claim that his personal record-keeping system was so complicated that it would have been difficult, if not impossible, to prepare accurate tax returns by the dates required by law. The trial judge ruled that the records were irrelevant and refused to admit them. We think this was error. The records were plainly relevant to Dark's defense, lame though it might have been.

The other incident occurred during the prosecutor's cross-examination of Dark. Dark testified, "I do not think I could have done [the 1973 and 1974 tax returns] under the circumstances under which I was laboring. On the due date my books were not in shape to file a tax return." At that point, the trial judge interrupted to ask the following question: "Well, the reason your books were not in shape is that you elected to spend time making money off somebody else and not keep your own books up, is that not correct?"

This Court has only recently had occasion to observe that "potential prejudice lurks behind every intrusion into a trial made by a presiding judge" and that, when such intrusion occurs, the judge must "sedulously avoid all appearances of advocacy as to those questions which are ultimately to be submitted to the jury." *United States* v. *Hickman,* Nos. 78-5148-49 (6th Cir. February 15, 1979), slip op. at 3. The question propounded by the trial judge here came dangerously close to violating his principle, for it could have created the impression in the minds of the jurors that the trial judge was unsympathetic to Dark's defense, a matter which was for the jury, and the jury alone, to evaluate.

In light of the overwhelming evidence of Dark's guilt, however, we do not believe that either the erroneous exclusion of Dark's financial records or the trial judge's isolated intrusion into the cross-examination of Dark affected Dark's substantial rights. Rule 52, FED. R. CRIM. P.

Accordingly, it is ORDERED that the judgment of conviction be, and hereby is, AFFIRMED.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5237

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

JOEL H. DARK - - - - *Defendant-Appellant*

ORDER—Filed June 13, 1979

Before: ENGEL and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

No judge of the Court having moved for rehearing *en banc,* the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5237

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

JOEL H. DARK - - - - *Defendant-Appellant*

ORDER STAYING MANDATE—Filed July 3, 1979

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

Supreme Court, U. S.
FILED
OCT 2 1979
MICHAEL RODAK, JR., CLERK

No. 79-215

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOEL H. DARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-215

JOEL H. DARK, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. A) is reported at 597 F.2d 1097.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1979. The court of appeals denied a petition for rehearing on June 13, 1979 (Pet. App. B).

The petition was filed on August 9, 1979.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court gave petitioner an adequate opportunity to present his defense.

2. Whether the trial court improperly interrogated the witnesses.

3. Whether the trial court correctly rejected petitioner's request, pursuant to 18 U.S.C. 3500, to order the government to turn over the case report of a government agent who testified at trial.

4. Whether the trial court correctly refused to file returned subpoenas served on government witnesses as part of the public record prior to trial.

5. Whether the trial court correctly refused to instruct the jury that an alleged partnership existed as a matter of law.

6. Whether the trial court correctly instructed the jury on the issue of willfulness.

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part, as follows:

> § 3500. *Demands for production of statements and reports of witnesses*
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the

[1] No timely application for an extension of time was filed. The petition is therefore out of time under Rule 22(2) of the Rules of this Court.

> possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of failing to file his income tax returns for 1973 and 1974, in violation of 26 U.S.C. 7203. The trial court sentenced him to five months' imprisonment on the first count, suspended the execution of a one-year term on the second count, and placed petitioner on three years' probation.

The evidence adduced at trial showed that during the prosecution years petitioner was a self-employed certified public accountant. He also taught accounting courses at Tennessee State University and was a part-time student at the YMCA night law school in Nashville (Tr. 82).[2] At the trial, the government established that petitioner had gross income of $36,331.10 and $40,779.22 from his accounting practice in 1973 and 1974, respectively (see, *e.g.*, Tr. 68-69), and received a $5,420 salary from Tennessee State in 1973 (Tr. 78-82). Although his gross income far exceeded the minimum filing requirements, petitioner did not file an income tax return for either year until 1976, after he became aware that he was the subject of a criminal investigation by the In-

[2] "Tr." refers to the trial transcript. "GX" and "DX" respectively refer to government exhibits and defense exhibits introduced at trial.

ternal Revenue Service (Tr. 135, 141). Petitioner conceded that he had sufficient gross income to require the filing of tax returns during the years in question and that he understood his obligation to file the returns. His sole defense at trial was that his failure to file had not been willful because the voluminous nature of his business and personal records prevented him from accurately computing his taxable income in time to meet the filing deadlines.

ARGUMENT

1. Petitioner first argues (Pet. 6-12) that the trial court did not give him an adequate opportunity to present his defense. At trial, petitioner testified that he conducted his accounting practice as a partnership (Tr. 184). On petitioner's motion (Tr. 141, 188), his individual income tax returns (DX 7) for 1973 and 1974, which were filed in September 1976, were admitted in evidence. At trial, petitioner's attorney showed the returns to petitioner and attempted to ask him what amount of partnership income was reflected on his individual income tax returns (Tr. 188). The district court precluded this line of questioning, however, stating that petitioner was not being charged with underreporting his income (Tr. 188-189).

Petitioner argues (Pet. 8-9) that the district court should have permitted him to testify as to the amount of income he received from the alleged partnership in order to counteract evidence presented by the government which suggested to the jury that his

gross income from his accounting practice was greater than it actually was, and so that the jury could compare the taxable income petitioner received to his gross income in its consideration of whether he acted willfully. Apart from the immateriality of the proposed testimony, it did not challenge the accuracy of the government's evidence or raise any issue of disputed fact. In order to establish petitioner's gross income for the years at issue, the government introduced into evidence a list of payments received from various clients (GX3)—a list that petitioner had supplied to the government during the investigation (Tr. 62-64, 68-69, 76). The government then called as witnesses the individuals who had made payments to petitioner during the years in question (see, *e.g.*, Tr. 89-105, 108-112, 117-122) for the purpose of corroborating petitioner's admission as to his gross income (see Tr. 270-271; *Smith* v. *United States*, 348 U.S. 147, 151-159 (1954)). Thus, the witnesses' testimony was entirely in accord with petitioner's own documentation of his gross income.

However, even on the assumption that this procedure might have misled the jury into believing that petitioner's gross income was more than it actually was, any confusion was dispelled by the cross-examination conducted by petitioner's counsel. That cross-examination established that the individual witnesses merely corroborated the figures on the list (see Tr. 89-105, 108-112). There was accordingly no need for petitioner to testify as to the income he received from the alleged partnership in order to counteract

any impression that his gross income was greater than it actually was.

At all events, there was evidence before the jury as to petitioner's income during the years in question. Petitioner was permitted to introduce into evidence his individual income tax returns for 1973 and 1974 (Tr. 188; DX 7). Accordingly, petitioner was not prejudiced by the trial court's refusal to permit him to state what amount of partnership income was reflected on his individual income tax returns.[3]

Contrary to petitioner's further claim (Pet. 9-12) the trial court did not err in excluding from evidence a portion of petitioner's records. The evidence which he was allowed to present (his "time diaries" (DX 10)) and the testimony of his wife, his secretary, and himself relating to the hours he worked, the time he spent attempting to organize his records, and the detailed nature of his records (see, *e.g.*, Tr. 174-181, 183-209, 242-250)), was sufficient to establish his point, *viz.*, that his recordkeeping system was cumbersome and complicated. Although the trial court excluded petitioner's "cash diaries" from evidence, they were not crucial to his defense. To the contrary, petitioner offered them as an additional illustration of the "meticulousness" with which he kept his records (Tr. 206).

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[3] Petitioner asserts (Pet. 8-9) that the tax returns were not examined by the jury. But there is nothing in the record which suggests that the jury was precluded from examining the tax returns. Nor was petitioner's counsel prevented from bringing the information contained in the tax returns to the jury's attention in closing argument had he so desired.

2. Contrary to petitioner's contention (Pet. 12), the trial court's interrogation of witnesses and its other conduct of the trial was proper (see, *e.g.*, *United States* v. *McDonald*, 576 F.2d 1350 (9th Cir. 1978), cert. denied, No. 78-1156 (Mar. 20, 1979); *United States* v. *Pinkey*, 548 F.2d 305, 308 (10th Cir. 1977); *United States* v. *Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977)). Indeed, the court instructed the jury that its participation in the case was to have no bearing on their evaluation of the case (Tr. 23-24, 337-338). While the court's inquiry (Tr. 210) whether petitioner's records were not in shape because he "elected to spend * * * time making money off of somebody else and not keep your own books up" perhaps could have been more carefully worded, the court of appeals correctly concluded that, in light of the overwhelming evidence of petitioner's guilt, that isolated question did not affect the fairness of petitioner's trial (Pet. App. 26).

3. Petitioner further argues (Pet. 15-16) that the trial court erred in refusing to direct the government to turn over to the defense, pursuant to its request under 18 U.S.C. 3500, the case report of Special Agent Hollingsworth, who testified for the prosecution. At the conclusion of Agent Hollingsworth's direct testimony, petitioner's counsel requested production of the agent's case report (Tr. 145), stating that government counsel "has provided us with all statements that this witness has entered in his file pertaining to conversations with Mr. Dark, and what he says Mr. Dark said" and that "we are entitled to

any other statements he may have in the file concerning his investigation of this matter that the government relied on" (Tr. 145-146).

But the Jencks Act does not require the government to turn over everything upon which the government has relied, but only so much of a witness's statement as "relates to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)). Here, the prosecutor stated that the government had turned over everything relating to the subject matter of the witness's direct testimony (Tr. 146). Rather than challenge this assertion and attempt to establish the existence of any additional Jencks Act material through cross-examination of the witness, petitioner indicated that it had no questions for the witness (Tr. 146). Petitioner therefore failed to establish that the government had not complied with the Jencks Act. See *United States* v. *Nickell*, 552 F.2d 684, 689 (6th Cir. 1977), cert. denied, 436 U.S. 904 (1978).

At all events, even on the assumption that the agent's report contained material which related to the subject matter of his testimony and which was not turned over to the defense, the government's failure to produce such material could not have prejudiced petitioner under the particular circumstances of this case. Here, Special Agent Hollingsworth testified only that petitioner's tax returns for 1973 and 1974 had not been timely filed (Tr. 135, 137, 139-141, 144); that petitioner had sufficient gross income in each year to require him to file tax returns (Tr.

135-139); that he had interviewed all of the petitioner's clients whom he was able to locate in an attempt to verify the amount of petitioner's gross income for the years in question (Tr. 144-145); and that petitioner had told him that he had failed to file his returns on time because "he had been busy with his clients' business, and that his books and records were in a mess" (Tr. 141). Petitioner conceded at trial that he was a person required to file tax returns (Pet. 6; Tr. 281, 303, 309) and that he failed to file the tax returns at issue (Tr. 194, 209). His defense was only that his failures to file were not willful because he kept such voluminous records that it was impossible for him to extract therefrom the figures necessary for inclusion on his tax returns in time to enable him to file his returns by the due dates (Tr. 192, 194, 204, 209-211, 299-303). Agent Hollingsworth's testimony was therefore entirely consistent with petitioner's defense.

It is well established that a failure to comply with the requirements of the Jencks Act should be excused only where it is clear that the defense was not prejudiced by the failure. *United States* v. *Snow*, 537 F.2d 1166, 1168 (4th Cir. 1976). The purpose of the Act is to provide the defense with the means of impeaching government witnesses by means of prior inconsistent statements. *United States* v. *Catalano*, 491 F.2d 268, 274 (2d Cir.), cert. denied, 419 U.S. 825 (1974); *United States* v. *Polizzi*, 500 F.2d 856, 893 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *United States* v. *Prieto*, 505 F.2d 8, 11 (5th Cir. 1974);

United States v. *Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976), cert. denied, 430 U.S. 967 (1977). Hence, this Court has observed that the harmless error doctrine must be strictly applied in Jencks Act cases. *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976). Here, however, there was no reason to impeach Agent Hollingsworth's testimony because it was in accord with petitioner's theory of defense. It is difficult to see, therefore, how petitioner could have been prejudiced by any failure to comply with the Jencks Act with respect to the agent's report.[4]

4. Petitioner also argues (Pet. 19) that the district court erred in refusing to file as part of the public record prior to trial returned subpoenas served on government witnesses. There is, however, no such requirement, which would subvert the policy of the Rules against requiring pretrial disclosures of the identities of witnesses. At all events, petitioner cannot claim that he was prejudiced by the trial court's action because he had no constitutional or statutory right to discovery of the names of potential government witnesses.[5] See *Weatherford* v. *Bursey*, 429

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[4] There is, accordingly, no need for this Court to decide whether the court of appeals correctly concluded that "Agent Hollingsworth's written case reports are not his 'statements' under 18 U.S.C. § 3500(e), and the trial court was under no obligation to examine the file *in camera*" (Pet. App. 25), or to determine whether the decision below with respect to these issues conflicts with the cases cited by petitioner (see Pet. 16-17).

[5] Petitioner argues (Pet. 18-20) that the court applied a "double standard" because it did not require the government's returned subpoenas to be filed. There is, however, nothing in

U.S. 545, 559 (1977); *United States* v. *Larson*, 555 F.2d 673, 676 (8th Cir. 1977); *United States* v. *Harris*, 542 F.2d 1283, 1291 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *United States* v. *Condor*, 423 F.2d 904, 910 (6th Cir.), cert. denied, 400 U.S. 958 (1970).

5. Petitioner further challenges (Pet. 21) the district court's failure to instruct the jury that petitioner's alleged partnership with William Jordan existed as a matter of law. But petitioner did not request such an instruction (see Rule 30, Fed. R. Crim. P.). At all events, the existence of the partnership was disputed (Tr. 254-260) and was therefore a question of fact for the jury (accord, *United States* v. *Hall*, 552 F.2d 273, 275 (9th Cir. 1977)). Moreover, the existence of the partnership had no bearing on petitioner's defense, but was at most remotely related to the question of his credibility. Compare *United States* v. *Hall*, *supra*, 552 F.2d at 275.

6. Finally, there is no support for petitioner's claim (Pet. 21) that the trial court erred in instructing the jury with respect to willfulness. As this Court held in *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976), "willfulness," as used in the felony and misdemeanor provisions of the Internal Revenue Code, means the "voluntary, intentional violation of a known legal duty." The trial court incorporated

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the record to indicate that he could not have obtained the same treatment for subpoenas served on his behalf if he so requested it.

that definition almost verbatim in its instructions (Tr. 333).[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1979

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[6] The pertinent portion of the instructions given by the court was as follows (Tr. 333):

> There is no necessity that the government prove that the defendant had any intention to defraud it or to evade the payment of any taxes by the defendant's failure to file, to be willful, under the provisions of the law.
>
> On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident, or due to his good faith misunderstanding of the requirements of the law.
>
> Willfulness in this context simply means a voluntary, intentional violation of a known legal duty.

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Supreme Court, U. S.
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OCT 12 1979
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-215

JOEL H. DARK - - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - **Respondent**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-215

JOEL H. DARK - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

May it please the Court:

1. In its Brief in Opposition, the United States argues that Petitioner's proffered evidence was properly excluded, saying, "Apart from the immateriality of the proposed testimony, it did not challenge the accuracy of the government's evidence or raise any issue of disputed fact" (Brief in Opp., p. 6). The United States fails to address itself to why it contends Petitioner's evidence is immaterial. Petitioner has demonstrated his rejected evidence *is* relevant and material to the single issue in dispute—the presence or absence

of criminal willfulness. As Petitioner has indicated, a review of those factors and circumstances relied upon by the government in reported tax cases to indicate the existence of criminal willfulness reveals a primary factor to be a showing of a large amount of income with a large resulting tax liability. This fact is also revealed in the testimony of government witness Grant Porter in Petitioner's trial (testifying concerning the prior late-filed returns):

> "Q. It left Mr. Dark getting a refund, even after all these years, of some four hundred and seventy-two or three dollars, isn't that correct?
>
> A. Yes, sir, that was the primary reason I closed the case." (Tr. 128).

and

> "Q. I think you indicated that your recommendation was that the case be closed, and you used the term 'under instructions'. Now, what type of instructions were you under to recommend that this type of case be closed?
>
> A. Yes, I was going to state that we were not encouraged to make recommendations for prosecution in cases where there wasn't a probability in our opinion, that a conviction would be obtained.
>
> It was my opinion that since the tax had already been paid, that Mr. Dark would probably not be convicted, since there would be no showing of harm to the government." (Tr. 129-130).

Thus Petitioner's disallowed evidence certainly did "challenge the accuracy of the government's evidence" in relation to its bearing on the only disputed issue.

The viewpoint of the United States expressed in this case would preclude a defendant in a murder trial from pleading self-defense—if the defendant "pulled the trigger," the defendant's evidence relating to circumstances and motive would be immaterial following the logic of the government here expressed.

Petitioner's contention is well stated in *United States* v. *Brown,* 411 F. 2d 1134 (10th Cir., 1969):

> "The critical issue to be considered by the jury in this case was not a determination of the acts done by Brown but whether such acts, largely admitted, were done with the specific intent to violate sections 7201 and 7206(1), a necessary element of the charges. (Citing cases.) Accordingly, the accused as part of his defense is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent."

Additionally, the statement that evidence of Petitioner's income was before the jury (Brief in Opp., p. 7) is in error. A document physically introduced but neither read nor seen by judge or jury cannot be said to be "before" the trier of fact for consideration. Nor can the United States seriously contend that Petitioner's counsel was not precluded from arguing Petitioner's amount of income to the jury when, prior to that argument, the trial judge said, "If they do, I'll blow them out of the courtroom" (Tr. 273).

The government contends the exclusion from evidence of Petitioner's records was not error because that testimony allowed to be elicited "was sufficient to establish his point, *viz.,* that his record keeping system

was cumbersome and complicated" (Brief in Opp., p. 7). The exclusion of Petitioner's records resulted from the trial judge's "sustaining" an "objection" which had not been made by adversary counsel. This conduct towards Petitioner's attempt to defend himself from a criminal charge is diametrically opposed to the trial judge's conduct during the presentation of the "unnecessary" government evidence of Petitioner's gross income. There the trial judge allowed full freedom for the presentation of gross receipts of Petitioner far in excess of what the trial judge later decreed to be the only "material" amount—$750.00. A single witness for the government established this amount for both years in question. Yet the trial judge did not "object" for the Petitioner and "sustain" that "objection" to the presentation of "immaterial" evidence. This simply confirms Petitioner's assertions of differing standards having been applied to the prosecution and the defense as one revelation of the trial judge's obvious attitude toward Petitioner.

2. It is true that the trial judge included cursory instructions to the jury to the effect that they were to disregard any apparent attitude of his in reaching their verdict. However, the position and influence of the trial judge over the lay jury throughout the trial cannot be cured by cursory instructions. See *United States* v. *Nazzaro*, 472 F. 2d 302 (2nd Cir., 1973). The government again refers to the "isolated question" of the judge while cross-examining the Petitioner. The question considered by the Court of Appeals and discussed by the United States here was *not* isolated—it

was simply one "tile in the mosaic of the trial" in which the prosecutorial role of the trial judge predominated.

Cases reported by the Courts of Appeals of all circuits abound in considerations of the actions of the trial judge in conducting trials. One case cited by the United States in its Brief in Opposition (*United States* v. *Candelaria-Gonzalez*, 547 F. 2d 201 [5th Cir., 1977]) is supportive of the position of this Petitioner. A complete listing of the cases involving the conduct of the trial judge would probably include a majority of the reported cases. However, there is a lack of a definitive statement from this Honorable Court to serve to guide both appellate and trial courts in this vital area. Petitioner thus contends that exercise of this Court's supervisory power in this case and full consideration would furnish a guide for future cases and would serve the interest of the administration of justice in the land.

3. The United States contends that Petitioner's counsel should have proceeded to challenge the assertion of the government attorney that the prosecution had turned over to Petitioner everything relating to the subject matter of Hollingsworth's direct testimony. The trial court was informed by Petitioner of the identity of those items furnished Petitioner, and those items obviously did not include everything about which Hollingsworth had testified. Yet the trial judge foreclosed further discussion of the matter with his immediate acceptance of the government position and question to Petitioner's attorney, "Ready, Mr. Clark?"

(Tr. 146). Further argument after the trial judge's ruling and comment would have been contemptuous.

In *United States* v. *Polizzi,* 500 F. 2d 856 (9th Cir., 1974), cited by the United States, the court stated, "The prosecution is obligated to disclose to the defense statements falling within the Jencks Act *regardless of anyone's perception of the utility of the statements* for impeachment." (Emphasis supplied.) And this Honorable Court reiterated in *Killian* v. *United States,* 368 U. S. 231, 82 S. Ct. 302 (1961) its finding in *Rosenberg* v. *United States,* 360 U. S. 367, 79 S. Ct. 1231: "a court should not confidently guess what a defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled . . ."

The trial court in Petitioner's case shirked his duty to independently determine the existence, or non-existence, of producible statements and to make appropriate orders based upon that determination.

Therefore, Petitioner believes that there is a definite need for this Court to consider the conflicting holdings of the courts of appeals concerning the actions to be taken by a trial judge upon the raising by a criminal defendant of a Jencks Act question and to determine the correct resolution of the conflicts between the decision in this case and others regarding the identity of producible statements.

4. Petitioner has stated in his petition his position regarding returned subpoenas, yet the United States has not yet responded to Petitioner's contention that such are orders of the issuing court and thus properly

a part of the public record. The arguments and supporting cases regarding witness lists are not in point. Title 28, §569(c) provides, "The Attorney General shall supervise and direct United States marshalls in the performance of public duties . . ." Petitioner doubts the efficacy of a request, should he have made one, that the United States Marshall not inform his supervisor of Petitioner's subpoenas. Moreover, Petitioner believes such a request to be improper for either the Petitioner or the United States Attorney since it seeks to routinely limit public access to court records.

5. The case cited by the United States in relation to the lack of an instruction by the trial court on the issue of a partnership (*United States* v. *Hall,* 552 F. 2d 273 [9th Cir., 1977]) is also not in point with Petitioner's contention. The true issue in *Hall* was whether substances were "chemically equivalent," and the court stated in its opinion, "Because the issue was not raised at trial *nor brought before us on appeal,* we do not decide whether an instruction on the definition of 'chemically equivalent' should have been given." As Petitioner pointed out to the court, the witness Jordan did deny in words that a partnership existed, yet he admitted to the facts which *under the law* constitute a partnership. The question was, therefore, not one of fact for the jury, but one of *law* for the judge to instruct the jury upon. The partnership issue was vital to the question of the credibility of the Petitioner at trial, where the only disputed issue was the presence or absence of criminal willfulness, an issue upon which only the Petitioner could offer direct evidence.

6. Petitioner has not alleged error in the wording of the jury instructions on willfulness given by the trial judge because of his knowledge that these instructions were in accord with *United States* v. *Pomponio*, 429 U. S. 10, cited by the United States. He does contend the interpretation of those words is a matter requiring further clarification by this Honorable Court as evidenced by the judge's question during oral argument in the Court of Appeals for the Sixth Circuit as presented in his petition. The importance of the essential element of willfulness in the criminal tax statutes cannot be overstated, and the exclusion of Petitioner's proffered evidence bearing on this sole disputed issue coupled with the obvious misinterpretation of the term necessitates further clarification from this Court.

For the above stated reasons, as well as those contained in the Petition for Writ of Certiorari, certiorari should be granted and the judgment reversed.

Respectfully submitted,

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